U.S. Department of Labor

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Issue date: 02Oct2001

Case No: 2001-LHC-518

OWCP No: 01-149074

In the Matter of:

JOHN W. LLOYD, DECEASED,
Claimant

vs.

ELECTRIC BOAT CORP.,
Employer

APPEARANCES:

DAVID N. NEUSNER, ESQ.,
On behalf of the Claimant

EDWARD W. MURPHY, ESQ.,
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for death benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by the widow of John W. Lloyd (Claimant)[1], a deceased employee, against Electric Boat Corporation, a self insured corporation (Employer).

[1]Hereafter, John Lloyd's widow, Olivia Minnie Lloyd is referred to as "Mrs. Lloyd" or "Claimant". John Lloyd is referred to as "Decedent".

The issues raised by the parties could not be resolved administratively and a hearing was held in New London, Connecticut, on June 12, 2001. All parties were afforded a full opportunity to adduce testimony and offer documentary evidence.[2]

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 2001-LHC-518 (JE-1; Tr. 14):

1. Jurisdiction of this claim is under the LHWCA, 33 U.S.C. §901 et seq.

2. Decedent was an employee of Employer.

3. Employer was timely advised of the injury/death.

4. The Notice of Controversion (LS-207) was timely filed.

5. Decedent died on October 29, 1998.

6. The national average weekly wage at time of Decedent's death was $435.88.

7. Employer/employee relationship did not exist at time of death.

8. Injury/death arose in the course and scope of employment: disputed.

9. Employer and Secretary of Labor were timely notified of injury/death.

10. An informal conference was held on October 25, 2000.

11. Medical benefits paid: Yes. Funeral expenses paid: Funeral Expenses of $1,925.00 not paid.

12. Decedent had asbestosis.

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[2] References to the transcript and exhibits are as follows: Transcript - TR. ___; Claimant's Exhibits - CX.___, p.___; Employer's Exhibits - EX. ___, p. ___; Joint Exhibits - JE. ___.

II. ISSUES

1. Causation - whether asbestosis caused, contributed to, hastened, or accelerated Decedent's death.

2. 8 (f) relief.

III. STATEMENT OF THE CASE

Testimony of Minnie Lloyd

Minnie Olivia Lloyd married John Lloyd (Decedent) in 1976 and was married to him at the time of his death on October 29, 1998. She has not remarried. (TR. 7-8).

Mrs. Lloyd met Decedent when they worked in the same machine shop. Decedent's job was to harden and temper steel for boats in the heat treatment room of the machine shop. While working in the heat treatment room, he was exposed to asbestos. (TR. 9). Mrs. Lloyd testified at trial that Dr. Cherniack diagnosed Decedent with asbestosis in 1980. Decedent retired from work in 1991. (TR. 10).

Background

Decedent was born November 17, 1925. (CX.4, p. 6). He began working for Employer in 1960. (CX.4, p. 30). Decedent had a history of heart trouble that began in the early 1970s when he was hospitalized several times with angina. (EX.4, p.2, CX.4, p.62). Decedent began smoking in his late twenties or early thirties. (CX.4, p.16). He was diagnosed with coronary artery disease in 1978. (CX.8, p.1). At that time he was smoking one and a half packs of cigarettes per day and drinking about four bottles of beer daily. (EX.4, p. 1) He was also overweight. (EX.4, p. 2). However, Decedent alleged he was only smoking two to four cigarettes per workday at a deposition he gave in 1988. (CX.4, p. 16). That year, Decedent underwent a quadruple coronary bypass. (CX.15, p. 37). He was diagnosed with asbestosis in 1980 or 1981. (CX.4, pp. 54-55, CX.13, EX.4, p. 3). A note from Dr. James Hollister informed Employer of Decedent's heart condition in 1980. (EX.1).

Decedent died at hospital on October 29, 1998. His death certificate listed respiratory failure and acute chronic congestive heart failure as the immediate causes of death. Chronic obstructive pulmonary disease ("COPD") and PVD were listed as conditions contributing to death but not related to cause. (CX.1). A postmortem examination performed at Mrs. Lloyd's request showed evidence of COPD, chronic bronchitis, pulmonary edema, pleural and diaphragmatic plaquing consistent with asbestosis, and of cardiac bypass surgery. (CX.14, p. 13). The parties in this case focused on the opinions of Dr. Welch, Dr. Cherniack and Dr. Godar to determine the cause of Decedent's death, the principal issue in this case.

Medical Evidence

Dr. Welch

Dr. Laura Welch wrote a medical opinion for Claimant's attorney dated September 18, 2000, in which she addressed the issue of whether asbestosis caused, hastened, or accelerated Decedent's death. (CX.5). She never examined Decedent in person. (CX.14, pp. 24-25). Rather, she reviewed his medical records. (CX.5, p. 1, CX.15, p. 14). In her report, Dr. Welch noted that Decedent died from congestive heart failure. However, she concluded that asbestosis had contributed to the progression of Decedent's coronary disease and cardiovascular dysfunction because it had reduced his diffusion capacity to 50% of predicted. (CX.5, p. 3).

Dr. Welch explained her theory of how Decedent's reduced diffusion capacity contributed to his congestive heart failure when she was deposed on June 25, 2001. (CX.15). She explained that any stress causing increased heartbeat and blood flow would actually decrease the rate of blood diffusion and, thereby, decrease the oxygen content in his blood. (CX.15, p. 17). Therefore, at a time of increased heart beat, she opined, Decedent's heart would receive less oxygen when it needed more and cause a heart attack or an episode of congestive heart failure. (CX.15, p. 18). Dr. Welch also explained that asbestos particles reduced diffusion capacity by blocking the alveoli and the capillaries from each other. (CX.15, p. 19). Furthermore, she explained that congestive heart failure can add fluid to the lungs, further reducing diffusion. She opined that the addition of fluid from congestive heart failure combined with an asbestos-related 50% reduction of diffusion capacity to so deprive Decedent's heart of oxygen that it "gave out". (CX.15, pp. 20-21). Dr. Welch also believed that asbestosis contributed to long-term development of congestive heart failure in Decedent. This occurred through recurring instances of scarring and fluid buildup over an extended period of time. The resulting incremental damage to the heart, she opined, built up until the final episode when he died. (CX.15, p. 21).

At her deposition, Dr. Welch also opined that emphysema, a form of COPD found in the autopsy, was clinically insignificant. (CX.15, p. 34). She explained that Decedent's COPD was only mild in nature because there had been no clinical evidence of it before death and the only evidence of it was in the autopsy. (CX.15, p. 40). She attributed restrictive lung disease to asbestos exposure. (CX.15, p. 14).

Dr. Welch has 20 years experience in practicing occupational medicine. (CX.15, p. 6). She is board certified in internal and occupational medicine. (CX.15, p. 7). Dr. Welch has held faculty positions at Albert Einstein, Yale University, and the George Washington University. At her present position with the Washington Hospital Center's Department of Internal Medicine, she practices primarily occupational environmental medicine. Her current duties are similar to those in her previous positions. She teaches residents in internal medicine and supervises public health students in environmental health. (CX.15, p. 4). She also has a clinical practice in which she advises patients as to whether their illnesses are work related. She conducts research on occupational health issues, primarily in the construction industry. (CX.15, p. 5).

For the past 15 years, Dr. Welch has managed a medical examination program for the Sheet Metal Workers International Association and its contractors. This program examines individuals in an effort to design educational and medical programs for occupational lung disease. (CX.15, p. 6). She testified that ninety percent of the cases she reviews for litigation are for plaintiffs and that she has taken the B reader test twice but has not passed it. (CX.15, pp. 23,25).

Dr. Cherniack

Dr. Martin Cherniack wrote an evaluation for Claimant's attorney dated August 9, 2000, in which he addressed whether or not asbestos dust was a complicating factor in Decedent's death. (CX.6). In addressing this issue, Dr. Cherniack relied heavily on autopsy results. Dr. Cherniack disagreed with Dr. Godar's attributing low lung volumes to Decedent's weight because he weighed under 100 k.g. (CX.6, p. 2). However, Dr. Cherniack did agree that smoking almost exclusively caused chronic obstructive disease with industrial bronchitis being a minimal consideration. (CX.6, pp. 2-3). He attributed restrictive lung disease to asbestos exposure. (CX.6, p. 4).

Dr. Cherniack concluded that heart failure was the primary cause of Decedent's death but that intrinsic lung disease, generally, and restrictive lung disease, specifically, contributed. However, he stated that without recent pulmonary studies it was impossible to specifically identify the impact of restrictive (asbestos related) versus obstructive (smoking related) components of Decedent's lung disease. (CX.6, p. 4). The most recent pulmonary function test was taken in July, 1993, for Dr. Cherniack by Dr. Louis Buckly. Dr. Buckly concluded both obstructive and restrictive diseases were mild at that time. (EX.4, p. 50). Furthermore, Dr. Cherniack acknowledged that Decedent's respiratory failure was primarily cardiac in origin. (CX.6, p. 3). Dr. Cherniack is board certified in both internal and occupational medicine. (CX.6, p. 1).

Dr. Godar

Dr. Thomas Godar originally examined Decedent and wrote a consultation summary in August, 1986. (CX.9). At that time, Dr. Godar observed that chest x-rays showed long term asbestos exposure in the form of bilateral pleural plaques. However, Dr. Godar pointed out that pleural plaques do not affect lung function. Therefore, he concluded that Decedent's asbestos exposure had not affected his lung function. (CX.9, p. 7). Dr. Godar determined from pulmonary function tests taken on August 14, 1986, that Decedent suffered from pulmonary emphysema and COPD. The pulmonary function tests also showed that Decedent was probably smoking around the time of the test, even though he had claimed to have quit sometime earlier. (CX.9, p. 6). At that time, Dr. Godar concluded Decedent had a 20% overall lung function impairment. He attributed 5-10% impairment of total lung function to asbestos exposure. (CX.9, p. 8). Dr. Godar diagnosed mild obesity, a dorsal vertebral abnormality, mild COPD associated with smoking and a low grade asthmatic bronchitis. He also diagnosed bilateral pleural plaques that could have

been asbestos induced, marginal pulmonary fibrosis that was consistent with asbestos fibrosis, heart disease with unstable angina, and hypertension. (CX.9, p. 7). At that time, Dr. Godar also attributed a fraction of reduced diffusion capacity to Decedent's asbestos exposure. (EX.6, pp. 22-23).

Dr. Godar wrote a report on June 8, 2001, in which he gave his opinion as to whether exposure to asbestos caused, contributed to, hastened or accelerated Decedent's death. (EX.5). He concluded that no lung disease related to Decedent's employment with Employer caused, contributed to, hastened or accelerated his death. According to Dr. Godar, the sole cause of Decedent's death was cardiac disease with no relation to associated respiratory disorders. (EX.5, p. 8).

In his June 8, 2001 report, Dr. Godar disputed the opinions of Dr. Welch and Dr. Cherniack. He disputed Dr. Welch's attribution of Decedent's reduced diffusion capacity to progressive asbestosis. Rather, he believed it was "in good measure" due to COPD from smoking and "in large measure" due to pulmonary edema from lung congestion. Dr. Godar stated he did not understand how mild asbestosis could have contributed to the progression of coronary disease and cardiovascular dysfunction. (EX.5, p. 6).

Dr. Godar gave a deposition for this case on July 20, 2001. (EX.6). At the deposition, he reiterated his opinion that Decedent's "death was associated with terminal cardiac disease, arteriosclerotic disease with pulmonary edema, and trackable failure following no less than twenty four years of angina pectoris, coronary bypass and extensive treatment." (EX.6, p. 7). He also identified acidosis as causing death. Dr. Godar attributed acidosis to heart failure but also testified that it was due, in part, to the inability of Decedent's respiratory system to oxygenate the blood and remove carbon dioxide. (EX.6, p. 32). The only other factor that could have affected his death, Dr. Godar opined, was diabetes, because it might have accelerated Decedent's vascular disease. (EX.6, p. 7). Dr. Godar also opined that Decedent's smoking probably contributed to his coronary problems but that it did not contribute to his terminal illness. (EX.6, pp. 8-9). Dr. Godar also pointed out that when he had seen Decedent in 1986, he was overweight and that obesity can affect lung and cardiac function. (EX.6, pp. 10-11). Dr. Godar also pointed to evidence of bronchitis and emphysema, which affected Decedent's breathing. (EX.6, p. 11).

At this deposition, Dr. Godar said that Decedent had suffered distention and that his diffusion had been mildly impaired. He ascribed this problem to three different things: 1. smaller lung resulting from being overweight; 2. obstructive lung disease; and 3. emphysema. (EX.6, p. 12).

Dr. Godar also addressed Decedent's asbestosis. Dr. Godar admitted that this "would certainly reduce the diffusion capacity slightly". However, he continued to believe the impact from asbestosis was minimal. (EX.6, p. 12). Dr. Godar reiterated his belief that asbestosis did not accelerate, hasten or cause Decedent's death, arguing that it was mild and showed no progression. (EX.6, p. 14).

At his deposition, Dr. Godar addressed his disagreement with Dr. Cherniack and Dr. Welch. He disagreed with Dr. Cherniack's conclusion that although Decedent's main cause of death was cardiac, restrictive lung disease contributed. Dr. Godar believed that Decedent's restrictive lung disease was mild

and did not contribute to his death. Specifically, Dr. Godar disagreed with Dr. Cherniack's conclusion that the autopsy evidence indicated both severe intrinsic heart disease and respiratory disease. He pointed out that Decedent's lung was wet from pulmonary edema due to cardiac failure. He opined that asbestosis could have contributed to Decedent's congestive heart failure only if it had been very severe and not mild. He stated the asbestosis would have to impair oxygen transfer to the point where it would have made treating the congestive heart failure difficult. Dr. Godar pointed to good oxygen levels in pulmonary function tests to support his conclusion that the asbestosis was very mild and had shown no progression. (EX.6, p. 17).

Dr. Godar disagreed with Dr. Welch's interpretation of the impact that Decedent's asbestosis had on his diffusion capacity. He believed Dr. Welch had implied that the reduced diffusion capacity was entirely due to asbestos exposure. Dr. Godar believed asbestos exposure played only a small role in reducing diffusion capacity. (EX.6, pp. 18,22-23). He stated that it is actually impossible to measure diffusion capacity and measure the results in a patient with heart failure because of the reduced blood flow. (EX.6, p. 19). Dr. Godar also disagreed with Dr. Welch's conclusion that asbestosis had contributed to Decedent's heart failure because he could not see the connection between the two. (EX.6, p. 20).

Dr. Godar is board certified in both internal medicine and pulmonary disease. (EX.6, pp. 4-5). He is experienced in diagnosing and treating patients with both occupationally related lung disease and cardiac conditions. (EX.6, p. 5). He was retained by Employer in this matter and examined Decedent once on Employer's behalf in 1986. (EX.6, pp. 5-6, p. 21).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence, draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of a claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 114 S.Ct 2251 (1994), aff'g, 990 F.2d 730 (3rd Cir. 1993).

CAUSATION

Section 20(a) of the Act provides Claimant with a presumption that Decedent's death was causally related to his employment if she shows he suffered a harm and employment conditions existed which could have caused, aggravated or accelerated the condition. See Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once Claimant proves these elements, she has established a prima facie case and is entitled to a presumption that the injury arose out of the employment. Keliata v. Triple Machine Shop, 13 BRBS 326(1981); Adams v. General Dynamics Corp., 17 BRBS 258 (1985). With the establishment of a prime facie case, the burden shifts to Employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

The parties stipulated that Decedent suffered from asbestosis. Decedent's wife, who worked in the same machine shop as Decedent, testified that Decedent was exposed to asbestos while working in the heat treatment room of the machine shop. In diagnosing Decedent with asbestosis in 1981, Dr. Balmes cited his asbestos exposure at work. Dr. Godar, Employer's specialist, cited work place exposure to asbestos in both of his reports. As the record clearly shows Decedent had asbestosis and was exposed to asbestos dust at work, and Drs. Welch and Cherniack relate the asbestos to Decedent's death, I find Claimant has presented sufficient evidence to invoke the Section 20(a) presumption.

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption by presenting substantial countervailing evidence that the injury was not caused by the employment. See 33 U.S.C. §920(a). The Fifth Circuit addressed the issue of what an employer must do in order to rebut a claimant's prima facie case in Conoco v. Director, OWCP, 194 F.3rd 684 (5th Cir. 1999). There, the Fifth Circuit held that to rebut the presumption, an employer does not have to present specific and comprehensive evidence ruling out a causal relationship between the employment related activities and an injury. Rather, to rebut a prima facie presumption of causation, the employer must present substantial evidence that the injury is not caused by the employment. Noble Drilling v. Drake, 795 F.2d 478 (5th Cir. 1986), cited in Conoco, 194 F.3rd at 690. For an employer to meet its burden it is sufficient if a physician unequivocally states, to a reasonable degree of medical certainty, that the harm is not related to the employment. O'Kelley v. Dep't of the Army/NAF, 34 BRBS 39 (2000), cited in Jones v. Aluminum Co. of America, 35 BRBS 37 (2001) (Doctor's opinion was insufficient to rebut 20(a) presumption because he never affirmatively stated decedent's cancer was not caused by work related asbestos exposure).

Dr. Godar wrote in his June 8, 2001 opinion and testified at his deposition that no lung disease related to Decedent's employment with Employer caused, contributed to, hastened or accelerated his death. He noted that Decedent's asbestosis was very mild and non-progressive. Dr. Godar opined that asbestosis could have contributed to Decedent's congestive heart failure only if it had been severe enough to impair oxygen transfer to the point where it complicated treatment. He based his assessment that the

asbestosis was mild on good oxygen showings in pulmonary function tests.[3] Dr. Godar also noted that pleural plaques shown in postmortem examination showed that the asbestosis was mild. Therefore, I find that Employer has successfully rebutted Claimant's prima facie case.

As a result of Employer's successful rebuttal, I must evaluate the record evidence as a whole in order to resolve the issue of whether or not the claim falls within the Act. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2nd Cir. 1982). I must weigh all the evidence in the record and render a decision supported by substantial evidence. See Del Vecchio, 269 U.S. 280 (1935).

The parties do not dispute that Decedent suffered from asbestosis. However, they have presented opinions from three different doctors in their dispute as to whether asbestosis caused, contributed to, hastened, or accelerated his death. Both Dr. Welch and Dr. Cherniack opined that asbestosis did play a roll in causing Decedent's death. Employer's expert, Dr. Godar, differed. For the following reasons, I find that the scales of evidence favor Claimant.

In examining the evidence, I note that both Dr. Welch and Dr. Cherniack admitted that congestive heart failure was the primary cause of death. However, Dr. Welch opined that reduced diffusion levels, resulting in part from asbestosis, contributed to stress on Decedent's heart. In turn, she believed that this stress resulted in the congestive heart failure listed, along with respiratory failure, as a direct cause of death on the death certificate. At her deposition, she attributed restrictive lung disease to asbestosis and downplayed the roll of any obstructive lung disease. Dr. Cherniack opined that intrinsic lung disease caused in part by asbestos exposure also contributed to Decedent's death.

Dr. Godar rebutted Dr. Welch's theory by disputing her premise that Decedent's asbestosis was extensive enough to affect his diffusion capacity. He believed Decedent's asbestosis was very mild and non-progressive based on good oxygen showings in pulmonary function tests. Dr. Godar also pointed to pleural plaques revealed in the autopsy to support this belief that the asbestosis was mild. Furthermore, Dr. Godar opined that it is impossible to successfully measure and interpret diffusion capacity when heart failure is present because blood flow is abnormal. Dr. Godar also observed that Dr. Cherniack had concluded that Decedent's primary cause of death had been heart failure but that restrictive lung disease had also modified the outcome. Dr. Godar believed, however, that neither restrictive nor obstructive lung disease played a roll in Decedent's death because both were stable.

Despite Dr. Godar's assertion that it was impossible to measure diffusion capacity due to abnormal blood flow, the record contains evidence of reduced diffusion capacity. Furthermore, Dr. Godar's assertion that Decedent's asbestosis was mild based on good oxygen showings in pulmonary tests taken

[3]The most recent pulmonary function test was taken in July, 1993, for Dr. Cherniack by Dr. Louis Buckly. Dr. Buckly concluded both obstructive and restrictive diseases were mild at that time. (EX.4, p. 50).

in 1993 is inconsistent with later evidence. The evidence shows that however mild Decedent's asbestosis may have been, his oxygen showings were poor at the time of his death. At his deposition, Dr. Godar admitted that acidosis caused Decedent's death. He blamed heart failure for the acidosis but also admitted that it was due, in part, to the inability of Decedent's respiratory system to oxygenate the blood and remove carbon dioxide. This shows reduced diffusion capacity and poor oxygenation, which Dr. Godar blames on heart failure. I note that when he examined Decedent in 1986, Dr. Godar attributed a fraction of reduced diffusion capacity to asbestos exposure. In his June 8, 2001, opinion, Dr. Godar disputed Dr. Welch's attribution of reduced diffusion capacity to asbestosis by admitting that he could not understand how mild asbestosis could contribute to the progression of coronary disease and cardiovascular dysfunction. However, Dr. Godar also admitted at his deposition that asbestosis "would certainly reduce the diffusion capacity slightly." Dr. Welch explained her theory clearly and convincingly at her deposition. She explained that asbestos particles blocked the alveoli and capillaries from each other, leading to reduced diffusion and contributing to a heart attack or congestive heart failure. Dr. Welch also noted that this process damaged the heart over time, increasing the risk of coronary problems. Absent a more detailed and substantive rebuttal than Dr. Godar's, I find Dr. Welch's assertion that asbestosis contributed, at least in part, to Decedent's reduced diffusion capacity is credible and more reasoned than Dr. Godar's opinion. I also find that this reduced diffusion capacity contributed, in turn, to Decedent's long term cardiac problems. It was also a secondary direct cause of his death as shown in his death certificate and in the post mortem examination. Therefore, I find that asbestosis did cause, contribute to, hasten or accelerate Decedent's death and his widow, Minnie Olivia Lloyd, is eligible for death benefits under the Act.

SECTION 8(f)

Employer requests relief from the Special Fund pursuant to Section 8(f) of the Act. Under the "aggravation rule", an employer is usually liable for the claimant's entire resulting disability when an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or condition. Strachan Shipping Co. v. Nash, 782 F.2d 513, 517 (5th Cir. 1986)(*en banc*); Director, OWCP v. General Dynamics Corp., 900 F.2d 506, 508 (2nd Cir. 1990). However, if an employer can prove entitlement to Section 8(f) relief, the Special Fund may assume responsibility for part of the employer's obligation. To obtain Section 8(f) relief when an employee is totally disabled, an employer must show that: 1) the employee had a pre-existing permanent partial disability; 2) this disability was manifest to the employer prior to the subsequent injury; and 3) the subsequent injury alone would not have caused the claimant's total permanent disability. Director, OWCP v. General Dynamics Corp., 982 F2d 790, 793 (2nd Cir. 1992); see Brown and Root, Inc. v. Sain, 162 F.3d 813 (4th Cir. 1998) (previously existing permanent partial disability must contribute to employee's death). When an employee is permanently partially disabled and not totally disabled, the employer must also show that the current permanent partial disability "is materially and substantially greater than that which would have resulted from the subsequent injury alone." 33 U.S.C. §908(f)(1), cited in Two R Drilling Co. v. Director, OWCP, 894 F.2d 748, 750 (5th Cir. 1990). Decedent died and is, therefore, permanently totally disabled.

The purpose of Section 8(f) is to prevent employer discrimination in the hiring of handicapped workers, and to encourage the retention of handicapped workers. Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1949); General Dynamics Corp, 982 F.2d at 793. It is also well settled that the provisions of Section 8(f) are to be construed liberally in favor of the employer. Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192 (5th Cir. 1977); Johnson v. Bender Ship Repair, Inc., 8 BRBS 635 (1978).

A pre-existing permanent partial disability can be (1) a scheduled loss under Section 8(c) of the Act; (2) an economic disability arising out of a physical infirmity; or (3) a serious physical disability which would motivate a cautious employer to dismiss an employee because of a greatly increased risk of an employment-related accident and compensation liability. C & P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977); General Dynamics Corp., 982 F.2d at 795; Cononetz v. Pacific Fisherman, Inc., 11 BRBS 175 (1979); Johnson v. Brady-Hamilton Stevedoring Co., 11 BRBS 427 (1979). Although the mere fact of a past injury does not establish a disability, the existence of a serious and lasting disability does. Foundation Constructors v. Director, OWCP, 950 F.2d 621 (9th Cir. 1991).

In this instance, Decedent began working for Employer in 1960. He began experiencing cardiac problems in the early 1970s, smoked for most of his life, and suffered from diabetes. Decedent's history of heart trouble began in the early 1970s when he was hospitalized several times with angina. Dr. Hollister's diagnosis of Decedent's heart condition in the early 1980s established the existence of a pre-existing permanent partial disability. I find this is the type of serious physical disability which would have motivated a cautious employer to dismiss a claimant because of a greatly increased risk of an employment-related accident and compensation liability. Decedent's death certificate listed chronic congestive heart failure as an immediate cause of death and an autopsy showed evidence of cardiac bypass surgery. These two facts suggest both a history of heart condition and that that condition caused his death. Therefore, I find Decedent suffered a pre-existing permanent partial disability.

The second requirement for 8(f) relief is that the pre-existing work-related injury is manifest to the employer. Sealand Terminals, Inc. v. Gasparic, 7 F.3d 321, 323 (2nd Cir. 1993). This requirement is not a statutory part of Section 8(f) but has been added by the courts. American Mut. Ins. Co. v. Jones, 426 F.2d 1263 (D.C. Cir. 1970). A pre-existing impairment is manifest if the employer knew or could have discovered the impairment prior to the second injury. Director, OWCP v. General Dynamics Corp., 980 F.2d 74, 80-83 (1st Cir. 1992); Lowry v. Williamette Iron and Steel Co., 11 BRBS 372 (1979). The existence or availability of records showing the impairment is sufficient notice to meet the manifest requirement. Director v. Universal Terminal and Stevedoring Corp., 575 F.2d 452 (3rd Cir. 1978); Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 1224 (5th Cir. 1989); Todd v. Todd Shipyards Corp., 16 BRBS 163 (1984). Further, virtually any objective evidence of pre-existing permanent partial disability, even evidence which does not indicate the permanence or severity of the disability, will satisfy the manifest requirement, since it could alert the employer to the existence of a permanent partial disability. Lowry, 11 BRBS 372; Director, OWCP v. Berkstresser, 921 F.2d 306, 309 (D.C. Cir. 1990). In the instant case, Employer was directly notified of Decedent's heart condition when Dr. Hollister wrote a note requesting a special accommodation for Decedent in 1980.

Lastly, an employer may obtain 8(f) relief where the subsequent injury alone would not have caused the employee's total permanent disability. General Dynamics Corp., 982 F.2d at 793. Put differently, relief may be obtained where the combination of the worker's pre-existing disability or medical condition and his last employment-related injury result in a greater permanent disability than the worker would have incurred from the last injury alone. Lockheed Shipbuilding v. Director, OWCP, 951 F.2d 1143, 1144 (9th Cir. 1991); Director, OWCP v. Newport News and Shipbuilding and Dry Dock Co., 676 F.2d 110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). The key element is whether the work-related injury, when coupled with the prior disability, materially and substantially aggravated and contributed to the employee's permanent disability.

It is undisputed that Decedent died from congestive heart failure. The only issue is whether Decedent's work-related asbestosis contributed as well. Clearly, Decedent's heart condition resulted in a greater permanent disability, death, than he would have suffered were asbestosis his only impairment. One cannot conclude that Decedent's death was solely due to asbestosis. Therefore, I find that Employer has presented sufficient evidence to establish a right to Section 8(f) relief. There is no evidence in the record which would indicate the Solicitor's office harbors any opposition in granting Employer's request for Special Fund relief. Therefore, the Special Fund will assume death benefit payments due after the initial 104 weeks have been paid by Employer.

The Special Fund is not liable for funeral expenses. Perry v. Bath Iron Workers Co., 29 BRBS 57 (1995); Bingham v. General Dynamics Corp., 20 BRBS 198, 205 (1988). Nor is the Special Fund liable for the payment of attorney's fees. Director, OWCP v. Alabama Dry Dock & Shipbuilding Co., 672 F.2d 847 (11th Cir. 1982), rev'g 12 BRBS 532 (1980), on remand, 17 BRBS 43 (1985).

ATTORNEY'S FEES AND EXPENSES

Claimant's attorney has submitted a request for attorney's fees and expenses in the amount of $8,894.22. Employer objects to the $225 hourly rate of compensation requested for David Neusner and Stephen Embry. Employer also objects to the $215 hourly rate of compensation requested for work performed by Melissa Olson. Employer makes no other objections. Employer has suggested and I find that, considering the complexity of this case and the region of the country in which these attorneys practice, the appropriate rates of compensation for the work performed by these attorneys are $200 and $175 per hour, respectively. Therefore, Employer will owe Claimant's attorney a fee of $5,922.25 for work performed plus expenses amounting to $2,258.22.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1. Employer shall reimburse or pay Decedent's widow, Minnie Olivia Lloyd, $1,925.00 for funeral expenses, pursuant to Section 9(a) of the Act.

2. Employer is ordered to pay Claimant death benefits pursuant to Section 9 of the Act, based on an average weekly wage of $435.88, commencing on October 29, 1998 and continuing for a total of 104 weeks.

3. Employer's request for Section 8(f) relief is hereby granted. Following cessation of payments by Employer continuing benefits shall be paid by the Special Fund pursuant to Section 8(f) of the Act.

4. Interest shall be paid on any sums determined due and owing at the rate provided by 28 U.S.C. §1961. Employer shall also pay interest on funeral expenses.

5. Employer shall pay Claimant's attorneys a fee for services and reimburse costs amounting to a total of $8,180.47.

So ORDERED.

A
LARRY W. PRICE
Administrative Law Judge